FOR ARGUMENT

IN THE

Supreme Court of the United States

October Term, 1977

Supreme Court, U. S.
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No. 77-240

ST. PAUL FIRE & MARINE INSURANCE CO., AETNA CASUALTY & SURETY CO., TRAVELERS INDEMNITY OF RHODE ISLAND, TRAVELERS INDEMNITY CO. OF RHODE ISLAND, TRAVELERS INSURANCE CO., HARTFORD CASUALTY COMPANY and HARTFORD FIRE INSURANCE CO.,

v. *Petitioners,*

DAVID M. BARRY, M.D., LEROY S. CHAPNICK, M.D., WALTER C. COTTER, M.D., PAUL J. M. HEALEY, M.D., ANTHONY F. MERLINO, M.D., PAUL B. METCALF, M.D., H. GERALD ROCK, M.D., and ROSARIO V. TOMASELLI, M.D.,

and

PENNY ANDREW, CONSTANCE V. BOISSE, CHRISTOPHER DANIELS, ARTHUR M. FERLAND, GLADYS L. SPAIGHT, and ALPHONSE D. VITULLO,
Respondents.

REPLY BRIEF FOR PETITIONERS

SIDNEY S. ROSDEITCHER
HOWARD S. VEISZ
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
345 Park Avenue
New York, New York 10022

THOMAS D. GIDLEY
STEPHEN J. CARLOTTI
HINCKLEY, ALLEN,
SALISBURY & PARSONS
2200 Industrial Bank Building
Providence, Rhode Island 02903

Attorneys for The
Aetna Casualty and Surety Company

CHARLES LISTER
JONATHAN M. WEISGALL
COVINGTON & BURLING
888 16th Street, N. W.
Washington, D. C. 20006

JOSEPH A. KELLY
CARROLL, KELLY & MURPHY
326 Industrial Bank Building
Providence, Rhode Island 02903

Attorneys for
Hartford Casualty Company and
Hartford Fire Insurance Company

WALKER B. COMEGYS
MARION K. LITTMAN
POWERS & HALL
30 Federal Street
Boston, Massachusetts 02110

KIRK HANSON
HANSON, CURRAN & PARKS
1210 Turks Head Building
Providence, Rhode Island 02903

Attorneys for
St. Paul Fire & Marine
Insurance Company

JOSEPH V. CAVANAGH
HIGGINS, CAVANAGH & COONEY
600 Turks Head Building
Providence, Rhode Island 02903

Attorneys for
Travelers Insurance Company

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Petitioners,

v.

DAVID M. BARRY, M.D., *et al.*,

Respondents.

REPLY BRIEF FOR PETITIONERS

Preliminary Statement

This case raises a basic issue of statutory interpretation: How to harmonize the express exemption from the Sherman Act conferred on the business of insurance by Section 2(b) of the McCarran-Ferguson Act with the exception for "boycott, coercion, or intimidation" contained in Section 3(b) of that Act. We showed in our main brief that the First Circuit's expansive reading of "boycott" to encompass every conspiracy characterized as a concerted refusal to deal would reintroduce most of the Sherman Act to the area of insurance company-policyholder relations, thus nullifying the exemption and frustrating the Congressional purpose.

Neither respondents nor the Government address this issue. Indeed, respondents appear to embrace the view that the term "boycott" in Section 3(b) does in fact apply most of the Sherman Act to the business of insurance and that what is not picked up as a "boycott" can be brought within the phrase "coercion or intimidation."

Respondents and the Government argue that their reading is necessary to fulfill the consumer protection objectives of the Sherman Act. We do not quarrel with the proposition that the Sherman Act protects consumers. But we are here interpreting the McCarran-Ferguson Act, the primary purpose of which was to leave the protection of policyholders to state regulation and which, in Section 2(b), expressly withdraws the Sherman Act from this area where the states have enacted such regulation.

Respondents also appear to argue that the conduct alleged here falls within the boycott exception because it was not authorized by Rhode Island. Respondents confuse the question of whether conduct is "regulated" within the meaning of Section 2(b) of the Act with the separate question of whether conduct falls within the boycott exception of Section 3(b). Neither respondents nor the courts below have ever questioned that the conduct alleged here is "regulated" by the State of Rhode Island within the meaning of Section 2(b) of the Act. The legislative history, this Court's decision in *FTC* v. *National Casualty Co.*, 357 U.S. 560 (1958), and a long line of appellate decisions confirm that the state regulation necessary to trigger the exemption is not limited to statutes authorizing the conduct alleged.

Once it is shown that there is state regulation within the meaning of Section 2(b), the antitrust exemption ap-

plies unless the conduct falls within the boycott exception. The question of whether conduct is a "boycott" does not turn on the form of state regulation. Indeed, as respondents acknowledge, if the conduct is a boycott no form of state regulation—including specific authorization—can bring the McCarran-Ferguson exemption into play.

The only issue here is how to draw the line between boycotts and other combinations and conspiracies in restraint of trade covered by the Sherman Act, so as to give meaning to the express exemption in Section 2(b) of the McCarran-Ferguson Act. We contend that this line can be found in the boycott cases previously decided by this Court, including *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533 (1944)—the case from which the phrase "boycott, coercion, or intimidation" was taken. These cases show that the term boycott has been reserved for concerted refusals to deal which are employed to exclude competitors of one or more of the conspirators, or to regulate the competitive practices of the targets. Neither respondents nor the Government have cited any case which applied the term in any other context.

Without this limitation, the boycott exception could be used to apply the Sherman Act to every controversy between insurance companies and policyholders concerning the terms and availability of insurance, notwithstanding the policy of the McCarran-Ferguson Act to leave such controversies to state regulation. In the end, the position of respondents and the Government simply reflects their disagreement with Congress concerning the effectiveness of state regulation in this area. But disagreements concerning Congressional policy should be addressed to Congress;

this Court should not be asked effectively to repeal the Section 2(b) exemption through an overly expansive interpretation of the boycott exception.

I

The First Circuit's interpretation of the boycott exception nullifies the express Sherman Act exemption provided in Section 2(b) of the McCarran-Ferguson Act.

Respondents and the Government, like the First Circuit, define "boycott" to include any conduct characterized as a concerted refusal to deal. But they do not suggest how this definition would preserve any boundary between conduct covered by the boycott exception of Section 3(b) of the McCarran-Ferguson Act and other joint activity exempted from the Sherman Act by Section 2(b) of the McCarran-Ferguson Act. As we pointed out, price-fixing, agreements to fix terms or risk classifications, agreements not to compete, and other joint activities covered by the Sherman Act but not usually referred to as boycotts, could be characterized as concerted refusals to deal with as much justification as the conduct alleged here. (Petitioners' Main Brief at 14-20.)

Respondents and the Government contend that the complaint here alleges a complete refusal by three defendants to sell any insurance to the policyholders of the fourth and, accordingly, that this Court need not concern itself with other situations in which the conduct might be characterized as a concerted refusal to sell except on fixed terms. But they do not claim that there is any logical distinction between such conduct and the conduct alleged here. They

merely urge that such other situations be treated on a case-by-case basis. (Respondents' Br. at 43; Gov't Br. at 8, 23.)

As Professor Areeda has noted, "there is no sharp logical distinction between refusing to sell at all and refusing to sell except on condition." Areeda, *Antitrust Analysis* 280-81 (2d ed. 1974). The distinction drawn by respondents in this case between a "complete" refusal to deal and a refusal to deal except on terms is, in fact, wholly artificial.

The complaint does not simply allege a conspiracy in which "three insurance companies [refused] to sell medical malpractice insurance to a group of physicians." (Respondents' Br. at 7.)* The complaint alleges a conspiracy among four insurance companies by which St. Paul was willing to sell medical malpractice insurance, but only on a claimsmade basis, and St. Paul's dissatisfied policyholders were unable to obtain any malpractice insurance from the other three. The complaint is not that respondents were unable to obtain any malpractice insurance, but that they were unable to obtain such insurance on an occurrence basis. (A. 24-25, 28.)**

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* *See also*, Gov't Br. at 23.

** In fact, in their First Circuit brief, respondents characterized their complaint as follows:

> "The alleged unlawful agreement in question further provided that after the Defendant St. Paul had successfully coerced its policyholders into accepting the policy changes it proposed, each of the remaining co-Defendants were to similarly notify their clients that like changes would have to be made in the substantive provisions of their policy coverage. And, of course, St. Paul would then refuse to accept any new clients from the ranks of the policyholders of its co-conspirators." (Appellants' Br. at 6, Barry v. St. Paul Fire & Marine Ins. Co., 555 F.2d 3 (1st Cir. 1977).)

As far as respondents are concerned, there is nothing which distinguishes this situation from one in which all four insurers agreed to sell to respondents on an occurrence basis only. Accordingly, there is no reason to single out the conduct alleged here for treatment different from an alleged agreement not to sell except at fixed terms.

Moreover, a refusal by the three defendants to sell to insureds covered by the fourth is nothing more than a different way of saying that the three have entered into an agreement with the fourth not to compete for customers—conduct which has never been characterized as a boycott under the antitrust laws.

Unlike *South-Eastern Underwriters* and similar boycott cases, it is not claimed here that the concerted refusal to deal was used to pressure any company willing to provide respondents with occurrence basis insurance to discontinue selling it. Here, plaintiffs have simply converted into a concerted refusal to deal conduct which could have been described equally as an agreement not to compete or an agreement to fix the terms of malpractice insurance. By arguing that such "concerted refusals to deal" amount to boycotts, respondents thus erase all distinctions between boycotts and other joint activity covered by the Sherman Act and make application of the Section 2(b) exemption turn on niceties of pleading which have no substantive significance.

II

The scope of the boycott exception has nothing to do with the form of state regulation.

Respondents have confused the question of what conduct falls within the boycott exception with the separate question of what form of state regulation is adequate to invoke the Sherman Act exemption. If the conduct is not a boycott, it is exempted from the Sherman Act so long as the state has enacted regulation in the field, whether that regulation is in the form of authorization or proscription. Conversely, as respondents recognize, if the conduct is a boycott the McCarran-Ferguson antitrust exemption will not apply even if the state has specifically authorized it. (Respondents' Br. at 23, 26.)

There has never been any question that Rhode Island's regulation of the business of insurance is sufficient to trigger the Sherman Act exemption provided in Section 2(b) of the McCarran-Ferguson Act.* Nor could there be.

Section 2(b) withdraws the Sherman Act from the business of insurance whenever the State has enacted regulatory legislation which "generally proscribes . . . or permits or authorizes certain conduct on the part of insurance companies. . . ." *Ohio AFL-CIO* v. *Insurance Rating Board,*

* In the words of the Court of Appeals:

"The parties agree that defendants' acts were related to the business of insurance and that Rhode Island effectively regulates that business." (555 F.2d at 6, A. 54.)

451 F.2d 1178, 1181 (6th Cir. 1971), *cert. denied,* 409 U.S. 917 (1972).*

It has never been suggested that the 2(b) exemption applies only where conduct is authorized by state law or where state law is inconsistent with the federal antitrust laws. Indeed, this Court has already held that a state statute prohibiting unfair competitive practices in the insurance business, virtually identical to Rhode Island's Unfair Competition and Practices Law, was sufficient state regulation to trigger the 2(b) exemption. *FTC* v. *National Casualty Co.,* 357 U.S. 560 (1958). In holding that such prohibitory state regulation displaced the Federal Trade Commission Act, this Court stated:

> "... An examination of [the McCarran-Ferguson] statute and its legislative history establishes that the Act withdrew from the Federal Trade Commission the authority to regulate respondents' advertising practices in those States which are regulating those practices under their own laws."
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> * * *
>
> "Petitioner ... argues ... that even if the McCarran-Ferguson Act bars federal regulation where state regulation has been effectively applied, the exercise of Commission authority in these cases should be upheld

* *Accord,* Dexter v. Equitable Life Assurance Society, 527 F. 2d 233, 236 (2d Cir. 1975); Lawyers Title Company of Missouri v. St. Paul Title Insurance Corp., 526 F.2d 795, 797 (8th Cir. 1975); Addrisi v. Equitable Life Assurance Society of the United States, 503 F.2d 725 (9th Cir. 1974), *cert. denied,* 420 U.S. 929 (1975); Commander Leasing Company v. Transamerica Title Insurance Co., 477 F.2d 77 (10th Cir. 1973); Proctor v. State Farm Mutual Automobile Insurance Co., 406 F.Supp. 27 (D.D.C. 1975), *aff'd,* 561 F.2d 262 (D.C. Cir.), *petition for cert. filed,* No. 77-580, 46 U.S.L.W. 3294 (U.S. Oct. 19, 1977). Lawyer's Realty Corp. v. Peninsular Title Insurance Co., 428 F.Supp. 1288 (E.D. La.), *aff'd,* 550 F.2d 1035 (5th Cir. 1977).

> because the States have not 'regulated' within the meaning of the Section 2(b) proviso. This argument is not persuasive in the instant case. Each State in question has enacted prohibitory legislation which proscribes unfair insurance advertising and authorizes enforcement through a scheme of administrative supervision. . . ." (357 U.S. at 562-64.)

This Court's analysis is confirmed by the language of the Act. Section 3(a) of the Act provides that "until June 30, 1948, . . . the Sherman Act . . . shall not apply to the business of insurance . . ." Section 2(b) provides that "after June 30, 1948 . . . the Sherman Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law." The plain import of this language is that if the states enact regulatory legislation the situation created during the moratorium is preserved and, unless conduct falls within the boycott exception, the Sherman Act continues to be totally inapplicable to the business of insurance.

Moreover, if the antitrust exemption were limited only to situations where state regulation authorized conduct inconsistent with the Sherman Act, the express Sherman Act exemption in Section 2(b) would have been wholly unnecessary. The general provisions of Section 2(b), which provide that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede" state regulation of insurance, would have alone been sufficient to preclude application of the Sherman Act to conduct authorized by state regulation.

The legislative history also shows that application of the Sherman Act is precluded whenever the states enact

regulatory legislation—and not just where the states have authorized conduct inconsistent with the Sherman Act. As Senator Ferguson, the co-author of the McCarran-Ferguson Act, stated in a discussion of the final version of the bill:

> "... After the moratorium has expired, if a State has not legislated on the subjects covered by the three acts [the FTC Act, the Sherman Act, and the Clayton Act] to which reference has been made, those acts shall be applicable to the business of insurance. *But insofar as the State is concerned which has specifically legislated on the subject, the three acts shall not apply.* ..." (91 Cong. Rec. 1443 (1945).) (Emphasis supplied.)

Senator Pepper also acknowledged that:

> "... [T]he legal effect of the proviso which the Senator had just read [§ 2(b)] is that a State can absolutely prevent the applicability of the Sherman Anti-trust Act and the Clayton Act to insurance companies doing business in the State *by passing a State act which will make combinations and restraints of trade unlawful in that State.*" (91 Cong. Rec. 1444 (1945).) (Emphasis supplied.)*

Senator Murdock agreed:

> "... Insofar as [the States] fail to cover the same ground covered by the Sherman Act and the Clayton Act, those Acts become effective again." (91 Cong. Rec. 1444 (1945).)

See also the legislative history quoted at pages 32-35 of Petitioners' Main Brief.

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* Senator Pepper, like respondents here, argued that such an exemption went too far, adding: "As a practical matter, we know that the States cannot and will not enforce these laws against insurance companies." But Congress rejected that view, enacting Section 2(b) without revision.

Finally, the contemporaneous interpretation of the Act confirms that prohibitory legislation, like Rhode Island's, was sufficient to render the Sherman Act inapplicable to the business of insurance—and that the exemption was not limited to cases where the states specifically authorized the conduct. During the moratorium period provided by Congress virtually every state, including Rhode Island, passed some version of the "Model Unfair Trade Practices Bill for Insurance," which prohibits unfair and anticompetitive practices in the business of insurance, on the understanding that such statutes were state regulation within the meaning of the McCarran-Ferguson Act. *See FTC* v. *National Casualty Co.*, 357 U.S. 560, 564 n. 6 (1968). The preamble to the Rhode Island statute specifically states that the purpose of the statute "is to regulate trade practices in the business of insurance in accordance with the intent of congress as expressed in the act of congress of March 9, 1945 (Public Law 15, 79th Congress) [The McCarran-Ferguson Act] ...." (R. I, Gen. Laws §27-29-1, A. 92.) An interpretation of the boycott exception which would withdraw the Sherman Act exemption from conduct regulated—but not specifically authorized by the states—would thus be contrary to the understanding held by state legislatures and everyone else for more than thirty years.

Thus, the McCarran-Ferguson exemption withdraws the Sherman Act from the business of insurance whenever the states have undertaken to regulate it; no showing of inconsistency between the Sherman Act and state regulation is needed to invoke the exemption. Accordingly, cases such as *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439 (1945), have no bearing here. That case involved a rate fixing conspiracy by railroads which were regulated under the Inter-

state Commerce Act. The railroads sought to *imply* an antitrust exemption for such conduct from the ICC's authority to regulate rates. This Court specifically noted that the only antitrust exemption provided by the Interstate Commerce Act at the time of decision related to mergers and acquisitions approved by the ICC and that the Act did not give the ICC comparable authority to exempt rate fixing combinations.* (324 U.S. at 456-57.) In these circumstances, the Court held that an antitrust exemption could not be *implied* unless there was a conflict between the antitrust laws and the ICC's authority to regulate rates. Here, however, petitioners are not relying on an implied exemption but on an express statutory exemption which withdraws the application of the Sherman Act where the states have regulated the business of insurance.**

The McCarran-Ferguson Act, moreover, contrasts with other statutory exemptions from the federal antitrust laws which expressly limit immunity to "transaction[s] approved or authorized" by a designated regulatory agency. (*See, e.g.*, Interstate Commerce Act, 49 U.S.C. §5(12).) Had Congress wished to impose such a limitation on the McCarran-Ferguson antitrust exemption, it could easily have done so. Instead—unlike any other federal antitrust exemption—Congress conditioned the McCarran-Ferguson exemption on the existence of "regulation" alone.

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* Such authority was later granted in the Act of June 17, 1948, three years after this Court's decision in Georgia v. Pennsylvania R. Co. *See* 49 U.S.C. §5b.

** Respondents note that Rhode Island regulates a great number of industries other than the insurance business, and that none of these other industries are, by virtue of such regulation, exempt from antitrust laws. (Respondents' Br. at 39 and Br. App. A.) Petitioners agree. But unlike these other industries, Congress singled out the business of insurance and provided it with an express antitrust exemption where the states regulate it.

While a showing of conflict between the Sherman Act and state regulation is thus irrelevant to the application of the express McCarran-Ferguson antitrust exemption, it is worth noting that the First Circuit's expansive interpretation of the boycott exception—by applying the Sherman Act to all joint activities affecting the terms of insurance—does threaten to undermine state systems of regulation, including Rhode Island's.

First, even where state regulation merely parallels the Sherman Act, there is a real potential for conflict. This point was made by the State Attorneys General who appeared as amici in support of respondents in *FTC* v. *National Casualty, Co.*, 357 U.S. 560 (1958). There, state laws regulating deceptive practices covered the same ground as the FTC Act. But as the Attorneys Generals' brief states:

"[M]ost of the state laws . . . are couched in broad terms and are enforceable initially through administrative interpretation and application. In dealing with concepts as indefinite as 'unfair methods of competition,' or 'unfair or deceptive acts or practices,' . . . disagreements between state and federal administrative authorities would of course be inescapable . . . . Similar conflicts between state and federal interpretations would be inevitable. As this Court said in *Garner* v. *Teamsters, Chauffeurs and Helpers, etc.*, 346 U.S. 485, 490-491 (1953): 'A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.'"

* * *

". . . Presumably the only instance in which the [Federal Government] would lack jurisdiction would be when a state held a hearing and concluded that the

> [conduct] was proper and the complaint should be dismissed. If the state entered its order first, the Commission could enter an identical one. But if the Commission's order came first, the states could no longer exercise their independent judgment. Perhaps they could enter an identical order. But they could not disagree in any respect on either the merits or the relief to be directed. This is the very kind of supersession of state regulation which the Commission elsewhere in its brief concedes is not permitted by the McCarran Act." (Brief to the Attorney General of the State of Michigan at 26-28, *FTC* v. *National Casualty Co.*, 357 U.S. 560 (1958).)

The dangers of conflict with the state regulatory scheme are even more pronounced where, as here, a private class action antitrust suit is involved. An expansive interpretation of the boycott exception may encourage policyholders to use the bludgeon of federal antitrust class action litigation as a device for obtaining solutions to grievances about the terms and availability of insurance heretofore left to state insurance regulatory agencies. Most antitrust class actions are resolved by way of settlement. But private settlements of controversies involving the terms of insurance contracts issued to an entire class of policyholders, run counter to a system of state regulation of insurance.* Even if federal courts, in approving such settlements, consider whether they were consistent with the state regulatory scheme, the federal courts' judgment about state insurance regulatory policy would be substituted for the judgment of the state insurance departments, contrary to the purposes of the McCarran-Ferguson Act.

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* *See* Note, Developments in the Law—Class Actions, 89 Harv. L. Rev. 1373-74, 1378, 1536 (1976).

Finally, the First Circuit's expansive interpretation of the boycott exception also threatens to create conflicts with state-authorized insurance activity because, as noted, if conduct amounts to a boycott even state authorization cannot bring the McCarran-Ferguson exemption into play.

Indeed, respondents themselves argue that under their definition of "boycott" state-authorized insurance activities such as "pools or other joint insurance mechanisms" and "refusals to deal on the basis of uniform risk classifications" would lose the protection of the McCarran-Ferguson Act and be subject to a rule of reason analysis. (Respondents' Br. at 46-47.) As a result, the reasonableness of state-authorized insurance activity, heretofore considered protected by the McCarran-Ferguson exemption, would now be tested by federal courts under the standards of the Sherman Act and could be the subject of protracted federal antitrust litigation.

In sum, by failing to draw any meaningful line between boycotts and other joint activity covered by the Sherman Act, the First Circuit interpretation of the boycott exception subverts the entire purpose of the McCarran-Ferguson Act. Respondents and the Government, like the First Circuit, are mistaken in asserting that this result is required by the plain meaning of the phrase "boycott, coercion, or intimidation," as an analysis of the very cases they cite discloses.

III

There is no precedent for the First Circuit's broad definition of boycott.

Respondents and the Government, like the First Circuit, maintain that the broad reading of the boycott exception is compelled by common usage of the term boycott in cases under the Sherman Act, and by the absence of any evidence of Congressional intention to use the term more narrowly in the McCarran-Ferguson Act. In our main brief we showed that this Court has consistently applied the term boycott, in Sherman Act cases, to concerted refusals to deal used to exclude competitors or to restrict the competitive practices of the target, and that, accordingly, the plain meaning of the boycott exception does not warrant the First Circuit's broad interpretation. (Petitioners' Main Brief at 21-30.) The cases cited by respondents and the Government support our position.*

Thus, respondents and the Government point to language in *United States* v. *South-Eastern Underwriters Ass'n,* 322 U.S. at 535-36, and 562, which refers to boycotts of consumers and refusals to sell to consumers. (Respondents' Br. at 9-11; Gov't Br. at 11.) But that case did not involve a mere concerted refusal to sell to consumers; the concerted refusals to sell to consumers in that case were specifically described as the means used to ex-

* Respondents argue at length that Congress intended Section 3(b) of the McCarran-Ferguson Act to apply to any "boycott" and that the language of Section 3(b) expressly refers to *any* act or agreement of "boycott, coercion, or intimidation." But this begs the real question as to what the term "boycott", as opposed to other joint activities normally proscribed by the Sherman Act, really means.

clude competing companies and agents which were not members of the Association from the business of insurance and to compel member insurance companies and agents to sell insurance at the prices fixed by the conspirators. The concerted refusals to deal were aimed at consumers who dealt with non-member or non-conforming companies and agents, in order to put pressure upon those companies and agents. *United States* v. *South-Eastern Underwriters' Assn.,* 322 U.S. at 535-36. In its brief in *South-Eastern Underwriters,* the Government explained that the defendants were charged "with conspiring to monopolize the fire insurance business and, specifically, with conduct to force out of business companies not members of their association" and that to that end "insurance companies . . . refuse[d] to furnish insurance to persons who failed to deal with them exclusively. . . ." (Brief for the United States at 33, 66, ***United States*** v. *South-Eastern Underwriters' Association,* ***supra.***) Similar attempts to force competitors from the market, or to restrain the competitive practices of a target, were involved in every other case cited by respondents in which a boycott was held to exist. Thus:

In *Fashion Originators' Guild of America, Inc.* v. *FTC,* 312 U.S. 457 (1941) (Respondents' Br. at 11; Gov't Br. at 21-22), conspiring dress manufacturers refused to sell to retailers that dealt with style pirates, in order to exclude the style pirates from competition.

In *United States* v. *Frankfort Distilleries, Inc.,* 324 U.S. 293 (1945) (Respondents' Br. at 11-13), producers and wholesale distributors of liquor refused to sell to retail dealers unless they agreed to refrain from dealing with competitors of the defendants which refused to be bound

by defendants' price fixing agreements. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951) (Respondents' Br. at 11), involved concerted refusals by manufacturers to deal with wholesalers in order to compel wholesalers to resell at prices fixed by the manufacturers.

In *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) (Respondents' Br. at 4, 13, 45; Gov't Br. 22), Broadway-Hale induced manufacturers to engage in a concerted refusal to sell to its competitor, Klor's, in order to exclude Klor's from competition.

Radiant Burners, Inc. v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) (Respondents' Br. at 10; Gov't Br. at 22), involved an alleged attempt by gas burner manufacturers to deny a competing manufacturer a seal of approval needed to make its product marketable, so as to exclude that manufacturer from competition.

Federal Maritime Commission v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968) (Respondents' Br. at 10 n. 4; Gov't Br. at 11), involved a refusal by members of a shipping conference to deal with steamship passengers who wished to purchase tickets from non-conference steamship lines in order to exclude the non-conference lines from competition.

Washington State Bowling Proprietors Association v. *Pacific Lanes, Inc.*, 356 F.2d 371 (9th Cir.), *cert. denied* 384 U.S. 963 (1966) (Respondents' Br. at 9), involved a concerted refusal by bowling alleys who were members of the Association to allow bowlers who patronized competing non-member bowling alleys to participate in Association

tournaments. The plaintiffs, non-member bowling alleys, claimed that this conduct excluded them from competition with the conspiring members of the Association.

While these cases simply exemplify the distinction between boycotts and other concerted refusals to deal which we maintain is reflected in this Court's decisions, other cases noted by respondents and the Government explicitly draw the same distinction. *Worthen Bank & Trust Co.* v. *National BankAmericard Inc.*, 485 F.2d 119 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974) (Respondents' Br. at 9), is such a case. There, suit was brought against a membership corporation comprised of banks entitled to issue credit cards bearing the BankAmericard name and to extend credit to holders of such cards. Plaintiff, a non-member bank, challenged a by-law of the corporation that barred banks belonging to other credit card organizations from issuing defendant's own cards or extending credit to its cardholders. The District Court held the membership corporation to be a "horizontal combination of competitors" and held enforcement of the by-law to be a "group boycott." (485 F.2d at 124.) The Court of Appeals reversed.

Relying on this Court's decision in *Associated Press* v. *United States*, 326 U.S. 1 (1945), the Court of Appeals expressly rejected the contention that all concerted refusals to deal constitute group boycotts. There, the Eighth Circuit observed:

> "... The [Supreme] Court, in group boycott language, struck down the bylaws of A.P. which restricted membership solely because the applicant was a competitor of an existing member. *With regard to the other bylaw, however, forbidding A.P. members to sell local*

news to non-members, an excellent example of a concerted refusal to deal, the Supreme Court did not strike down that prohibition. Id. at 21-22, 65 S.Ct. 1416." (485 F.2d at 128.) (Emphasis supplied.)

Group boycotts, said the Court, "generally involve either:

"1. horizontal combinations among trades to exclude direct competitors from the market. *See e.g., Eastern States Retail Lumber Dealers' Assn.* v. *United States,* 234 U.S. 600, 34 S. Ct. 951, 58 L.Ed. 1490 (1914), or,

"2. vertical combinations to exclude competitors of some of the members of the combination. *See e.g., Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed. 2d 741 (1959), or,

"3. combinations designed to influence the trade practices of boycott victims rather than eliminate them as competitors. *See, e.g., Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission, supra,* 312 U.S. at 457, 61 S.Ct. 703, 85 L.Ed. 949." (485 F.2d at 124.)

Thus, far from supporting respondents' position that all refusals to deal are boycotts, *Worthen* squarely rejected it.

Union Circulation Co. v. *FTC,* 241 F.2d 652 (2d Cir. 1957) (Gov't Br. at 22) is to the same effect.

There, the FTC challenged the legality of certain "no switching" agreements pursuant to which magazine distributors agreed not to hire salesmen who had been employed by any other distributor during the preceding year. Like respondents here, the FTC alleged that these agreements—which deprived its targets of the ability to carry

on their trade—constituted a group boycott. The Court of Appeals disagreed. Distinguishing such cases as *Fashion Originators Guild of America* v. *FTC,* 312 U.S. 457 (1941), the Court held that

> "[t]he restraints here under consideration, the 'no-switching' agreements, are dissimilar in several significant respects to the group boycotts that have been held illegal *per se* by the Supreme Court. The 'no-switching' agreements are directed at the regulation of hiring practices and the supervision of employee conduct, not at the control of manufacturing or merchandising practices. These agreements are not designed to coerce retailers, or other independent members of an industry, into abandoning competitive practices of which the concerted parties do not approve." (241 F.2d at 657.)*

Respondents assert that the District of Columbia Circuit, in *Proctor* v. *State Farm Mutual Automobile Insurance Co.,* 561 F.2d 262 (D.C. Cir.), *petition for cert. filed,* No. 77-580, 46 U.S.L.W. 3294 (U.S. Oct. 19, 1977), held that a conspiracy to refuse to pay more than a fixed price for automobile repairs "fell within the boycott exception." (Respondents' Br. at 38.) In fact, the Court found precisely the opposite, holding the McCarran-Ferguson Act to immunize the conduct complained of from the federal antitrust laws.

Proctor stands for the proposition that a horizontal conspiracy cannot be converted into a boycott merely by char-

* In *Worthen* and *Union Circulation,* the determination that there was no group boycott left open the question of whether the conduct complained of constituted an unreasonable restrain of trade otherwise in violation of Section 1 of the Sherman Act. Here any such inquiry is foreclosed—not because the scope of the Sherman Act should in any way be narrowed, or because the Sherman Act is unavailable to to consumers—but because the McCarran-Ferguson Act renders the Sherman Act applicable to the business of insurance only to the extent that boycotts are alleged. Here, there is no boycott.

acterizing it as a refusal to deal except at terms fixed by the conspiracy. It holds that a boycott requires some additional conduct aimed at penalizing the target, or those who deal with it, in order to force the target to conform its competitive practices to those dictated by the conspirators.

Respondents themselves acknowledge that a boycott is "an enforcement mechanism" (Respondents' Br. at 12); a means of "carry[ing] out" an "agreement in restraint of trade" (Respondents' Br. at 22). Respondents characterize the conduct alleged in the complaint as "a boycott to enforce a horizontal agreement not to compete." (Respondents' Br. at 12.) But the alleged agreement not to compete is indistinguishable from the alleged concerted refusal to sell to St. Paul's customers; indeed, these are just two different ways of characterizing the same conduct. There is no claim that any separate conduct was undertaken to compel adherence to the agreement not to compete.

The same considerations which preclude the conduct alleged here from being classified as a boycott also preclude it from being brought within the "boycott" exception to the McCarran-Ferguson Act under the rubric of "coercion or intimidation."

Every "restraint of trade" which violates the Sherman Act necessarily restricts the economic freedom of some parties and thus could be said to involve "coercion." But every Sherman Act violation could not involve "coercion" within the meaning of the exception to the McCarran-Ferguson Act for otherwise the Sherman Act exemption would be meaningless.

The phrase "coercion or intimidation" was used in *United States* v. *South-Eastern Underwriters* 322 U.S. at 535-36, to describe the whole panoply of activities used by

the conspirators to exclude competitors or penalize them for failure to conform their competitive practices to those dictated by the conspiracy. These activities included blacklists and disparagement, as well as concerted denials of products or services to those who would not conform or to persons dealing with them.

The legislative history shows that Congress was using the phrase to apply to such enforcement activities.

> "Mr. Celler. . . . There is, properly, proscribed in the wording of the pending bills acts 'of boycott, coercion, or intimidation.' . . . The Senate version, however, had in addition to 'any act of boycott, coercion or intimidation' the word 'agreement' to boycott, coerce, or intimidate.
>
> "What is the danger in leaving that word out? There is a great deal of danger. These great companies can issue a blacklist. It need not be in writing, there need not be a so-called overt act, it could be an oral blacklist, and they would frighten the wits out of all these small companies. In addition there could be an 'agreement' for what is known as separation. Let me tell you something about the 'separation.' Under 'separation,' if an agent wrote insurance for an outside or marked or proscribed company, or a blacklisted company, he was immediately stripped of his privileges; that is to say, he was not permitted to write insurance for any of the members of the self-constituted governing organizations known as boards. If a member of any of the boards wrote business through that agent which represented independent or nonmember companies, such member company was subject to punishment and was compelled to give up the business. . . ." (91 Cong. Rec. 1087 (1945).)

Senator O'Mahoney similarly used the phrase to apply to such enforcement activities. Thus he explained:

> "The Insurance Executives Association undertook by regulation to coerce, intimidate, and boycott its own members and compel them to obey the rules and regulations the association itself prescribed." (91 Cong. Rec. 1486 (1945).)

Senator O'Mahoney then gave an example of conduct constituting "boycott, coercion, or intimidation" by reading from the rules of the Association:

> "Whenever the trustees by a vote of two-thirds of their membership shall decide that any member has been guilty of unfair or unethical conduct involving violation or evasion of the rules or principles herein outlined, they shall impose upon such member any penalty they may believe to be most appropriate and fitting, including expulsion from membership, or they may refer their finding to the territorial or special organization having jurisdiction for the imposition of a proper penalty. . . .
>
> "In addition to or in lieu of a fine the board of trustees may require that the offending member shall retire from risks or agencies involved for such period as the board of trustees may decide upon and/or that such member shall make adequate restitution when possible to the member or members who may have been injured by the unfair or unethical act of the offending member." (*Id.*)

This, Senator O'Mahoney concluded,

> ". . . is the record of one agreement to coerce and intimidate persons engaged in the insurance business." (*Id.*)

Here there are no enforcement activities to compel anyone to adhere to the terms of the horizontal agreement alleged. There is nothing more than the allegation of the horizontal agreement itself. Hence there is nothing that can be characterized as "boycott, coercion, or intimidation."

Conclusion

The cases and the legislative history provide the basis for drawing a reasonable line which distinguishes between conduct covered by the boycott exception in Section 3(b) of the McCarran-Ferguson Act and conduct exempted from the Sherman Act under Section 2(b). The First Circuit's interpretation of the boycott exception erases that distinction without justification and without providing an alternative boundary which would give meaning to the entire Act. The judgment of the First Circuit should be reversed.

Respectfully submitted,

SIDNEY S. ROSDEITCHER
HOWARD S. VEISZ
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
345 Park Avenue
New York, New York 10022

THOMAS D. GIDLEY
STEPHEN J. CARLOTTI
HINCKLEY, ALLEN,
SALISBURY & PARSONS
2200 Industrial Bank Building
Providence, Rhode Island 02903

Attorneys for The
Aetna Casualty and Surety Company

CHARLES LISTER
JONATHAN M. WEISGALL
COVINGTON & BURLING
888 16th Street, N. W.
Washington, D. C. 20006

JOSEPH A. KELLY
CARROLL, KELLY & MURPHY
326 Industrial Bank Building
Providence, Rhode Island 02903

Attorneys for
Hartford Casualty Company and
Hartford Fire Insurance Company

WALKER B. COMEGYS
MARION K. LITTMAN
POWERS & HALL
30 Federal Street
Boston, Massachusetts 02110

KIRK HANSON
HANSON, CURRAN & PARKS
1210 Turks Head Building
Providence, Rhode Island 02903

Attorneys for
St. Paul Fire & Marine
Insurance Company

JOSEPH V. CAVANAGH
HIGGINS, CAVANAGH & COONEY
600 Turks Head Building
Providence, Rhode Island 02903

Attorneys for
Travelers Insurance Company